

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE ex rel.)	
PAUL G. SUMMERS,)	
Attorney General,)	
)	Plaintiff,
)	
v.)	Case No. _____
)	
ALLAN BARASH, DEBRA GUZMAN,)	
and ANDREW GOODRICH,)	
)	
Defendants.)	

AGREED FINAL JUDGMENT AND PERMANENT INJUNCTION

Comes now plaintiff State of Tennessee and defendants Allan Barash ("Barash"), Debra Guzman (“Guzman”) and Andrew Goodrich (“Goodrich”) and present this Agreed Final Judgment and Permanent Injunction. This Court being fully advised in the premises, now finds:

- 1. The parties to this Agreed Final Judgment and Permanent Injunction have read and understand the nature, terms, and contents of this Agreed Final Judgment and Permanent Injunction and agree to be bound by all the provisions contained therein.
- 2. Defendants consent to personal jurisdiction.
- 3. This Agreed Final Judgment and Permanent Injunction constitutes a fair and adequate settlement of all the issues involved in this cause of action.
- 4. The parties recommend that this Court issue this Agreed Final Judgment and Permanent Injunction.
- 5. Defendants are residents of Michigan and have done business in the State of Tennessee.
- 6. The Attorney General, Paul G. Summers, in conjunction with Dave McCollum, the Director of the Tennessee Division of Consumers Affairs, is authorized to bring actions to enforce the provisions of the Tennessee Consumer Protection Act of 1997, codified at Tennessee Code Annotated § 47-18-101, *et seq.*

I. General

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

7. **Jurisdiction.** This Court has jurisdiction over this Agreed Final Judgment and Permanent Injunction and the parties hereto through their consent and under Tennessee Code Annotated §16-11-103. This Court is empowered to order this Agreed Final Judgment and Permanent Injunction by agreement of the parties pursuant to Tennessee Code Annotated §47-18-108. Pursuant to Tennessee Code Annotated §47-18-107, venue as to all matter between the parties hereto or arising out of this Final Judgment And Permanent Injunction is solely in the Chancery Court of Davidson County, Tennessee.

8. **Jurisdiction Retained.** Jurisdiction and venue is retained by this Court to enable any party to this Agreed Final Judgment and Permanent Injunction to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, modification or enforcement of the provisions of this Agreed Final Judgment and Permanent Injunction.

9. **Severability.** If any provision or provisions of this Agreed Final Judgment and Permanent Injunction is or are declared invalid by a court of competent jurisdiction, the remainder of this Agreed Final Judgment and Permanent Injunction shall, at the option of plaintiff, remain in full force and effect and shall not be affected by such declaration.

10. **Waiver of Statutes of Limitation and Service of Process.** Defendants waive any statute of limitation that may apply to this Agreed Final Judgment and Permanent Injunction and its underlying lawsuit. Defendants further waive service of process of the underlying lawsuit and its summons.

II. Definitions

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the following terms shall have the following meanings:

11. "Defendants" mean Barash, Guzman, and/or Goodrich, acting individually or in concert with others, and includes any business enterprise (a corporation or otherwise) that Barash, Guzman or Goodrich, currently or in the future, may own, operate or manage, including without limitation a telecommunications carrier, except that this shall not include Long Distance Services, Inc., so long as it remains in bankruptcy.

12. "Independent third party" means a party: (1) operating from a facility physically separate from any facility owned or operated by Defendants; (2) in which Defendants do not have any direct or indirect ownership or proprietary interest; (3) which Defendants do not manage, control or direct, either by themselves or through agents, representatives or insiders, including relatives; and (4) which does not derive commissions or compensation based on the number of changes, sales, or authorizations confirmed.

13. "Clear and conspicuous" means that the required disclosures are presented in such a manner, given their size, color, contrast and proximity to any related information as to be readily noticed and understood by consumers. A disclosure is not clear and conspicuous if, among other things, it is ambiguous or it is obscured by the background against which it appears, or by its location within a lengthy disclosure of non-material information. Clear and conspicuous also means in an oral presentation that the information is presented in a manner that a consumer will hear and understand, at a normal speed in the same tone and volume as the sales offer.

14. "Telecommunications carrier" means the provider of telecommunications services or enhanced telecommunications services.

15. "Telecommunications service" means the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. This includes, but is not limited to, interLATA, intraLATA, local, and long distance telephone service.

16. "Enhanced telecommunications service" means any service or merchandise, other than interLATA, intraLATA, long distance or local exchange service, including but not limited to telecommunications service credit cards, prepaid calling cards, voice mail, and personal toll-free numbers for which any charge or assessment appears on a billing statement directed to a consumer by a telecommunications carrier.

17. "Subscriber" means the consumer in whose name the local exchange carrier has listed a telephone number; or the consumer who is primarily responsible for paying the telephone bill for the listed telephone number; or, if a commercial or business consumer, a person with apparent authority to act for the business or the person primarily responsible for the business' decision-making.

18. "Consumer" means any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, governmental entity, business entity or association.

III. Permanent Injunction

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that:

19. Defendants shall not directly or indirectly represent that a consumer has authorized the transfer of the consumer's telecommunications carrier to Defendants, or agreed to the provision of telecommunications service or enhanced telecommunications service without the express authorization of the consumer.

20. Before obtaining authority to change a consumer's telecommunications carrier or to render or provide telecommunications service or enhanced telecommunications service to a consumer, Defendants shall clearly and conspicuously disclose to each consumer solicited, all charges of any kind associated with the consumer's purchase of Defendants' telecommunications service(s) or enhanced telecommunications service(s), including but not limited to, monthly fees, local exchange carrier (LEC) switch fees, one-time fees, monthly fees, usage fees (e.g., per minute charges), and the like.

21. Defendants shall not rely on any authority, including but not limited to a written letter of agency (LOA), to authorize a change of a consumer's telecommunications carrier or to authorize the provision or rendition of telecommunications service or enhanced telecommunications service, unless and until Defendants have:

A. confirmed that the consumer who authorized the transaction is the subscriber to the telephone line(s) affected by the transaction and that such authorization includes the subscriber's actual signature; and

B. verified that the subscriber, in fact, has authorized the change of telecommunications carrier or the provision or rendition of telecommunications service or enhanced telecommunications service. An independent third party, as defined herein, shall perform this verification. (When initial authorization is obtained through telemarketing, it shall not be verified in the course of the same telephone call.) The independent third party shall obtain appropriate

verification data, such as the consumer's date of birth, and shall state to the consumer and obtain the consumer's assent to the following disclosures:

- i. the consumer's name, address, and the numbers of all telephone lines affected by the transaction, including but not limited to, those telephone lines switched to a new telecommunications carrier or provided telecommunications service or enhanced telecommunications service; and
- ii. that the consumer is the subscriber to all of the telephone lines affected by the transaction;
- iii. the name(s) of the telecommunications company or carrier that is replacing the consumer's previous carrier or that is adding telecommunications service or enhanced telecommunications service, and, where applicable, the name(s) of the carrier(s) being replaced; and all costs associated with such carrier change or provision of telecommunications service or enhanced telecommunications service, including but not limited to, LEC switch fees, monthly fees, usage fees (*e.g.*, fees assessed per minute of usage), one-time fees, and the like; and
- iv. when verifying a change of telecommunications carrier, the fact that the consumer can designate only one telecommunications carrier to handle the consumer's long distance service and one telecommunications carrier to handle the consumer's local toll service for each listed telephone number; and
- v. any other material conditions associated with the consumer's use or receipt of any goods and services that are the subject of the transaction.

22. Defendants shall tape record the above verification in full, including all statements by the consumer and the verifier. Before Defendants tape record, they shall disclose to the consumer the fact that they are tape recording the verification.

23. Defendants shall comply with the form and content requirements of 47 CFR §64.1150 as those requirements are from time to time amended with regard to orders for long distance service obtained by Defendants using any written LOA.

24. Defendants shall not promote, market, offer for sale, sell, or solicit authority to provide or render any telecommunications service or enhanced telecommunications service through the use of, or in connection with, any sweepstakes, contest, or prize promotion directed to consumers.

25. Defendants shall not use forms or documents used, or intended to be used, by consumers to enter sweepstakes, contests or drawings of any description as written authority to execute a change of any person's telecommunications carrier, or to provide or render any telecommunications service or enhanced telecommunications service.

26. Defendants shall fully comply with the State of Tennessee's unfair or deceptive trade practices and/or consumer protection laws, codified at Tenn. Code Ann. § 47-18-101 *et seq.*

27. Defendants shall fully comply with the State of Tennessee's laws, regulations and rules regarding the switching of a consumer's telecommunications carrier, and the provision or rendition of enhanced telecommunications services, codified at Tennessee Code Annotated § 65-4-125 and Tennessee Regulatory Rule 1220 4-2.56.

28. Defendants shall fully comply with the State of Tennessee's laws, regulations and rules regarding telemarketing solicitations, codified at Tennessee Code Annotated §§47-18-1501 *et seq.*, and with the Federal Trade Commission Telemarketing Sales Rule, 16 CFR Part 310.

29. This Agreed Final Judgment and Permanent Injunction does not constitute approval by the Attorney General of the State of Tennessee of any practice, act, or conduct of Defendants, and Defendants shall not make any direct or indirect representations to the contrary.

30. Nothing in this Agreed Final Judgment And Permanent Injunction shall be construed to affect any private right of action that a consumer may hold against Defendants.

31. Defendants shall be responsible for educating any of Defendants' agents, employees and representatives, including independent contractors, about the terms and requirements for compliance with this Agreed Final Judgment and Permanent Injunction. Each such person shall certify, by signing an affidavit, that he or she has read this document, and agrees to abide by it.

32. Defendants shall clearly and conspicuously disclose, in all advertisements, solicitations, publications, circulars, or marketing or promotional materials of any description whatever, circulated or distributed within the State of Tennessee, that are intended to solicit consumers to authorize any change of telecommunications carrier or to authorize the provision or rendition of any telecommunications service or enhanced telecommunications service, LDSI's full name and address, and the following:

A. the fact that the purpose of the advertisement, solicitation, publication, circular, or marketing or promotional material is to solicit consumers to authorize a change of telecommunications carrier, or the provision

or rendition of telecommunications service or enhanced telecommunications service;

B. the purpose for, and the amount of, all charges associated with the consumer's use or receipt of the promoted goods and services, including but not limited to, fees imposed by the consumer's local exchange carrier for the change of telecommunications carrier, monthly recurring fees, one-time fees, usage fees (e.g., fees assessed per minute of usage) and the like;

C. a toll-free customer service telephone number answered by Defendants' employees during regular business hours;

D. any other material conditions associated with the consumer's use or receipt of the promoted goods and services.

33. Defendants shall cause Defendants' corporate name, and a toll-free customer service telephone number answered by Defendants' employees during regular business hours to appear clearly and conspicuously on any bill for telecommunications or enhanced telecommunications services provided by Defendants to any consumer in the State of Tennessee.

34. Defendants shall maintain for a period of at least two (2) years, and produce to the Attorney General within thirty (30) days of receipt of written notice to produce the same, the following:

A. all scripts of telephonic solicitations, advertisements, solicitations, publications, circulars, or marketing or promotional materials of any description whatever, circulated or distributed within the State of Tennessee, which are intended to solicit consumers to authorize any change of telecommunications carrier, or the provision or rendition of any telecommunications service or enhanced telecommunications service;

B. proof of verification of all changes of telecommunications carrier initiated by Defendants, and proof of verification of all authority purportedly granted to Defendants by any consumer to provide or render telecommunications service or enhanced telecommunications service. Such

proof shall include, but is not limited to, the voice tape recording of all independent verifications as required herein;

C. all documents relating to written complaints or telephonic complaints from consumers received by Defendants or by any state agency that are forwarded by that agency in writing to Defendants, including the disposition of such complaint by Defendants; and

D. all affidavits required herein.

35. Defendants shall establish, implement, and maintain procedures for the investigation, adjustment and issuance of refunds or the removal of unpaid charges for consumers who complain to the their State Attorney General, any of the states' consumer affairs agencies, the Federal Trade Commission, the Federal Communications Commission, any of the states' public utility commissions, the consumer's local exchange carrier, or to Defendants, alleging that the transfer of such consumer's telecommunications carrier, or the provision or rendition of telecommunications service or enhanced telecommunications service, was undertaken without the consumer's authorization. Within ten (10) business days of Defendants "learning" (as defined below) that they have changed a consumer's telecommunications carrier or charged a consumer for telecommunications services or enhanced telecommunications services without having authorization from the consumer being charged, Defendants shall refund to the consumer (or remove if unpaid) any and all charges associated with switching the consumer back to the carrier of his or her choice, and shall refund (or remove if unpaid) any and all costs assessed for the provision or rendition of the unauthorized telecommunications service or enhanced telecommunications service.

Defendants are deemed to have "learned" about such unauthorized transactions when:

A. Defendants receive a complaint from a consumer (either directly from the consumer or indirectly through a third party, such as one of the agencies specified above) alleging lack of authorization, and

i. Defendants are unable, for any reason, to produce, within ten (10) business days of receiving the consumer's complaint, the tape recorded verification authorizing the transaction, or

ii. the consumer on the tape recorded verification is not the subscriber to the telephone line(s) affected by the allegedly unauthorized transaction, or

iii. the tape recorded verification fails to comply with requirements stated herein.

III. Representations and Warranties

36. Defendants shall be prohibited from directly or indirectly participating in any activity to form a separate entity or corporation for the purpose of engaging in acts prohibited in this Agreed Final Judgment and Permanent Injunction or for any other purpose which would otherwise circumvent any part of this Agreed Final Judgment and Permanent Injunction.

37. Defendants shall not construe this Agreed Final Judgment and Permanent Injunction as relieving them of the obligation to fully comply with all state or federal law, regulations, or rules.

38. This Agreed Final Judgment and Permanent Injunction is binding on Defendants and their respective agents, servants, heirs, successors, assigns and any other persons or entities acting directly or indirectly on their behalf.

39. Defendants stipulate and agree that the terms of this Agreed Final Judgment and Permanent Injunction are an exercise of the State of Tennessee's regulatory and police powers and, therefore, pursuant to 11 USC §362(b) of the United States Bankruptcy Code are not subject to the automatic stay. If for any reason it is determined that any term of this Agreed Final Judgment and Permanent Injunction is subject to the automatic stay, then defendants shall consent to modify the stay to allow for the enforcement of the terms herein, except for the collection of a money judgment.

40. If, after the date of this Order, the Tennessee Attorney General's Office or the Tennessee Division of Consumer Affairs receives as few as one (1) complaint (written or verbal) against defendants, then defendants shall, upon written notice to them or their attorney(s) of the complaint, have a duty to conduct a prompt and thorough investigation to determine what caused the complaint and to take prompt remedial measures to correct the causing factor(s). Within ten (10) business days of receiving the complaint, defendants shall

report in writing to the Tennessee Attorney General's Office or the Tennessee Division of Consumer Affairs a description of their investigation, their findings, and their corrective measures. This investigation and report are in addition to any other obligations herein. If, after the date of this Order, the Tennessee Attorney General's Office or the Tennessee Division of Consumer Affairs receives a minimum of five (5) complaints (written or verbal) against defendants within any sixty (60) day period, then defendants shall, upon written request by the Tennessee Attorney General's Office or the Tennessee Division of Consumer Affairs to defendants, or their attorneys, suspend within ten (10) days of the mailing of the request, all marketing and new sales in this State. In addition, if the Tennessee Attorney General's Office or the Tennessee Division of Consumer Affairs has requested suspension under this provision, then defendants, separately and severally, shall also consent to the entry of an Order permanently enjoining them from operating any business enterprise within this State, unless and until, they file with the Tennessee Division of Consumer Affairs a performance bond issued by a surety or bonding company licensed by and in good standing with the applicable state regulatory agency and in a sum sufficient to guarantee that defendants will comply with the terms herein, but in no event less than \$5,000,000. This remedy shall be in addition to any other remedy available at law or in equity, including but not limited to civil penalties pursuant to Tennessee Code Annotated § 47-18-108.

41. Defendants understand that upon execution and filing of this Order, any subsequent failure to comply with the terms herein is prima facie evidence of a violation of the Tennessee Consumer Protection Act of 1977 codified at Tennessee Code Annotated § 47-18-101 *et seq.*

42. The titles and headers in this document are for the convenience only and are not intended by the parties to lend meaning to the provisions herein.

43. This document shall not be construed against the "drafter" because all parties hereto participated in drafting this document.

44. Nothing in this Agreed Final Judgment and Permanent Injunction shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition this Agreed Final Judgment and Permanent

Injunction shall not bar the State or other governmental entities from enforcing laws, regulations, or rules against defendants.

45. This Agreed Final Judgment and Permanent Injunction may be executed in one or more counterparts and facsimile signatures shall be deemed to constitute original signatures of the parties hereto.

46. Defendants stipulate to filing by the Tennessee Attorney General and entry by this court of an amended order specifying the dollar amounts, derived from the funds referenced herein, payable to the State of Tennessee for purposes of restitution, penalties, and/or costs, once the State of Tennessee determines these amounts.

III. Restitution, Attorneys Fees and Civil Penalties

47. The parties acknowledge that this Agreed Final Judgment and Permanent Injunction is the result of years of negotiation between the Defendants; the Attorneys General of the states of Alabama, Arkansas, Georgia, Illinois, Indiana, Missouri, New York, Ohio and Tennessee (the "States"); and the following "Individual Plaintiffs": Kenny and Susan Siegal, George Clay, Evelyn J. Ellison, Sharon Kennedy, T. C. Glasscox, Jr., Richard DeBerry, and Kimberly Williams Howell. Under the "Settlement Agreement" attached as Exhibit 1, the States and the Individual Plaintiffs acknowledge having received from the Defendants the total sum of \$328,743, which sum is currently held in escrow by the National Association of Attorneys General. In addition, under the Settlement Agreement the Defendants agree to pay the States and the Individual Plaintiffs the total additional sum of \$325,000. Both of these sums [\$328,743 and \$325,000] along with any interest earned thereon are to be divided by the States and the Individual Plaintiffs as they may agree and is to be used by the Individual Plaintiffs to pay attorneys fees and costs and by the States to pay restitution to consumers, to pay for attorneys fees and investigative costs, and may be designated for those purposes or for consumer education, litigation, public protection or local consumer aid funds or any other purpose authorized by state law at the discretion of each state's Attorney General.

48. In the event the Attorney General is unable to locate consumers entitled to restitution, those funds due such consumers shall be treated as unclaimed property in the possession of the State of Tennessee pursuant to the Uniform Disposition of Unclaimed Property

Act, Tennessee Code Annotated § 66-29-101, *et seq.* These funds may be delivered to the Treasurer prior to the statutory due date.

49. Defendants waive the original ten (10) day notice pursuant to Tennessee Code Annotated § 47-18-108(a)(2) as to matters occurring prior to the date of entry of this Assurance. **50.**

All court costs associated with the filing and distribution of this Agreed Final Judgment and Permanent Injunction and any incidental costs and expenses incurred thereby shall be borne by defendants. No costs shall be taxed against the State as provided by Tennessee Code Annotated § 47-18-116.

IT IS SO ORDERED, ADJUDGED AND DECREED.

CHANCELLOR

**JOINTLY APPROVED AND
SUBMITTED FOR ENTRY:**

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